No. 05-910 JAN 18 2006

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IN THE

Supreme Court of the United States

STEVEN L. SIMASKO,

Petitioner,

v.

PETER R. GEORGE, individually and in his official capacity as St. Clair County Prosecutor, and MARY ROY KELLY, jointly and severally,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the proper standard to apply to claims made by policymaking employees asserting denial of their protected right to free speech and what protection will be given to policymaking employees' right of free speech as set forth in the First Amendment to the U.S. Constitution and cases cited herein?

2. What is the proper standard to apply to claims made by policymaking employees asserting denial of their protected right to intimate association and what protection will be given to policymaking employees' right of intimate associations as set forth in the First Amendment to the U.S. Constitution and cases cited herein?

3. Did Respondents' actions in demoting and constructively discharging the Petitioner in retaliation for Petitioner's refusal to support his co-worker in a judicial race and his refusal to curtail his brother's support of the opponent result in violations of Petitioner's First Amendment rights of free speech and association?

4. Are Respondents, who are both criminal prosecutors, entitled to qualified immunity from personal liability pursuant to § 1983 for their actions in constructively discharging Petitioner in retaliation for exercising his Constitutional rights of free speech and association?

LIST OF PARTIES AND STATEMENT TO THE COURT OF NO INTEREST

The parties to the proceedings are as listed in the caption. It is Petitioner's belief that Defendant County of St. Clair has no interest in the outcome of this Petition as it was not a party to the proceedings in the United States Court of Appeals for the Sixth Circuit.

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CITATION OF OPINIONS AND ORDERS

The opinion of the Court of Appeals for the Sixth Circuit in *Simasko v. County of St. Clair* is published at 417 F.3d 559 (6th Cir. 2005) and was decided and filed on August 3, 2005. Petitioner Steven Simasko's Petition For Rehearing *En Banc* and Petition For Panel Rehearing was denied without opinion and the unpublished order was issued October 20, 2005.

The Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment of the United States District Court of the Eastern District of Michigan, Southern Division, in *Simasko v. County of St. Clair, et al.*, Case No. 03-CV-73145-DT, dated September 15, 2004 is unpublished.

STATEMENT OF THE BASIS FOR JURISDICTION

The order sought to be reviewed was entered on August 3, 2005. The date of the order denying rehearing and rehearing en banc is October 20, 2005.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. amend. I: Congress shall make no law . . . abridging the freedom of speech.

U.S. CONST. amend. XIV, § 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1996): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner Steven L. Simasko (hereinafter "Simasko") is a former Assistant Prosecutor for Defendant St. Clair County. Until January 1, 2005, Respondent Peter George (hereinafter "George") was the Prosecutor for St. Clair County. George was elected to the position of Prosecutor by a panel of three

Circuit Court judges.[1] Concurrently, Respondent Mary Roy Kelly (hereinafter "Kelly") was the Chief Assistant Prosecutor for St. Clair County. Kelly was appointed to the position of Chief Assistant by George upon his election to the post of Prosecutor.[2] As Chief Assistant, Kelly was Simasko's co-worker and immediate supervisor.

In 2002, Simasko and Kelly, along with others, ran for a judicial vacancy in the 72nd Michigan Judicial District. Simasko announced his candidacy in 2001 and Kelly joined the race some time later. The election was a non-partisan race and Simasko and Kelly opposed each other in the primary. George supported Kelly in the election. Simasko lost in the primary. Kelly continued to the general election, where her opponent was Cynthia Platzer. Platzer eventually won the election.

Following the primary, Kelly, on several occasions, solicited Simasko's support for her judicial campaign against Judge Platzer. On the first occasion, Kelly telephoned Simasko and "asked Steve [Simasko] . . . if he would be willing to support or endorse me. And he said something to the effect he didn't have a dog in the race, he was just tired and he just needed to sit back and not do anything."

Kelly next approached Simasko in the Prosecutor's Office during work hours. During this second solicitation, Kelly also asked Simasko to persuade his brother, Frank Simasko, a

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[1] Judges Deegan, Adair and Kelly (who is the husband of Respondent Mary Kelly) appointed George to the position of Prosecutor.

[2] There is no question in this case that Peter George and the Kellys (Mary Kelly and her husband, Judge Daniel Kelly) were close personal friends. George testified that he is a social friend of the Kellys and has known them both since they were interns in the Prosecutor's Office. Kelly testified that both she and her husband are close personal friends of Peter George. The families vacationed together in Aruba and Peter George and Daniel Kelly once shared office space.

local attorney, not to support Kelly's opponent, Cynthia Platzer. Kelly expressed to Simasko her displeasure concerning his brother's support of Platzer, indicating that she and her husband (Judge Daniel Kelly) "took it personally."[3] Kelly told Simasko if he could not prevail upon his brother to cease and desist his public support of her opponent then, in return, she wanted Simasko's public support to level the playing field. Kelly told Simasko "does he (Frank Simasko) realize what's going to happen to his practice?" Simasko told Kelly that he was sorry that she felt as she did, but he again reiterated to her that he did not wish to support any candidate in the race. As she was leaving his office, Kelly responded, "this won't be a nice place for you to work."

In addition to the direct solicitations by Kelly, Simasko was approached by another co-worker, Senior Assistant Prosecutor Joe McCarthy, who was active in the Kelly campaign. McCarthy told Simasko that the Kellys were "really upset" with Simasko and his brother. McCarthy instructed Simasko that he needed to curtail his brother's support of the Platzer campaign and told him that "this would not happe in my family." McCarthy reminded Simasko that Kelly was his supervisor and questioned whether Frank Simasko knew "what they'll do to him?" When Simasko did not change his position, McCarthy left Simasko's office.

Kelly learned late on the night of the general election held on November 5, 2002 that she had lost the race to Judge Platzer. Kelly learned of the results while holding an election eve gathering at the Thomas Edison Inn. After learning of the loss, Kelly walked up to a group of people and said, "[t]hat fucking Simasko is done."

Following the general election, Simasko met with George and Kelly on December 4, 2002 to discuss his annual performance evaluation. This was the first occasion in the

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[3] Plaintiff's brother appeared in print ads supporting Cynthia Platzer.

eighteen years that Simasko had been employed by the Prosecutor's Office in which a substantive performance evaluation took place. Prior to that time, Simasko's job performance had *never* been an issue. Simasko was completely unprepared and "blindsided" by the events that transpired at the December 2002 meeting with George and Kelly. He went into the meeting "thinking that Pete George had no particular problem with me" and that "I didn't think there was going to be any problem with my performance or them saying I'm going to lose my job." Instead, Simasko was told by George that he (George) was strongly considering demoting him and reducing his pay.

At that point, Simasko believed that George had already made up his mind and he did not want to wait to find out if he needed to be looking for another job. Instead, Simasko wrote to George on the following morning and advised that should George decide to demote him and decrease his salary by approximately $20,000 as threatened, he would treat the same as a discharge pursuant to the terms of the Collective Bargaining Agreement. George's response was to confirm that he was, in fact, demoting Simasko to a lesser position and decreasing his pay as a result. After this initial exchange of letters, Simasko wrote a second letter to George, confirming that the pay decrease was unacceptable and he was treating the same as a discharge pursuant to the Collective Bargaining Agreement. Simasko was discharged on December 31, 2002.

On the same day that Simasko was told of his demotion and pay cut, Respondents circulated a Memorandum indicating that John Ange (hereinafter "Ange") would be "rejoining our staff" on December 16, 2002. At the time Ange was hired, he was to receive one step below the top pay scale for an Assistant Prosecutor, essentially the same salary that Simasko was receiving at the time of his demotion and pay cut. Ange played a significant role in Kelly's 2002 campaign

for judgeship, including assistance in forming her election committee. In fact, Ange was the first member of Kelly's election committee for the 2002 judicial race. In addition to his assistance on the campaign committee, Ange was also a financial contributor to Kelly's 2002 campaign.

Petitioner Steven Simasko initiated this action with a Complaint filed in the United States District Court for the Eastern District of Michigan on August 19, 2003. Simasko asserted in Count I of his Complaint that he was demoted and constructively discharged by Respondents in retaliation for exercising his constitutionally protected rights of free speech and association, in violation of 42 U.S.C. § 1983. On May 18, 2004, Respondents moved for summary disposition pursuant to FED. R. CIV. P. 56 on all counts of Petitioner's complaint. Following oral argument, the District Court, *inter alia*, denied Respondents' Motion for Summary Judgment as to Petitioner's § 1983 claim.

On September 28, 2004, Respondents filed a Notice of Appeal in the Sixth Circuit Court of Appeals, appealing the District Court's denial of their motion. *Simasko v. County of St. Clair*, 417 F.3d 559, 560 (6th Cir. 2005). The Court of Appeals reversed the trial court, holding that Respondents' actions did not violate the Constitution and that they were entitled to qualified immunity. *Id.* at 562. On October 20, 2005, the Court of Appeals entered an order denying Petitioner's Petition For Rehearing *En Banc* and Petition For Panel Rehearing.

ARGUMENT

After eighteen years as an Assistant Prosecutor with St. Clair County, Simasko was demoted and discharged by Respondents in retaliation for exercising his rights of free speech and intimate association. Specifically, Simasko was discharged on December 31, 2002 in retaliation for his refusal to publicly endorse or support Kelly's political campaign for

a non-partisan judicial seat, for his association with his brother, Frank Simasko, and his refusal to curtail his brother's public support of Kelly's opponent in the general election for the seat on the 72nd District Court.

Review of the Court of Appeals' order is warranted for three reasons. First, there is split among the Circuit Courts of Appeals concerning the scope of the policymaker exception created in *Elrod v. Burns*, 427 U.S. 347 (1976). Second, this case presents an important issue of constitutional law not yet decided by this Court, *to wit*: Does the policymaker exception preclude claims for violation of the right to intimate association? Third, the Sixth Circuit's application of the policymaker exception is in conflict with Supreme Court decisions.

I. REVIEW IS WARRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING APPLICATION *VEL NON* OF THE *ELROD/BRANTI* EXCEPTION TO AN EMPLOYEE'S CLAIM FOR VIOLATION OF HIS RIGHT TO FREE SPEECH

A. Public Employees Have Protected First Amendment Rights

Public employees have constitutionally protected rights under the First Amendment, including the rights to free speech, *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 142 (1983) and freedom of expressive association, *Elrod v. Burns*, 427 U.S. at 355-57; *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980). The Supreme Court has also affirmed a constitutional right to freedom of intimate association, *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1. Public employees' employ-

ment may not be conditioned on an infringement of those rights. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

B. The *Elrod/Branti* Exception

This Court established a narrowly defined exception to the right of free association in *Elrod v. Burns*, 427 U.S. at 362-67. The *Elrod* Court, in a plurality opinion, held that non-policymaking and non-confidential employees could not be terminated on the basis of their political association or beliefs.[4] In *dicta*, the Court created an exception to this rule against patronage dismissals for policymaking employees. Accepting the government's need for politically loyal employees to ensure effective implementation of government policy, *Elrod* stated that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.* at 367, 372.

The Court has discussed the policymaker exception on three additional occasions, *Branti v. Finkel*, *Rutan v. Republican Party*, 497 U.S. 62 (1990), and *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996). None of these decisions, however, provided any significant guidance in the application of the *Elrod* exception. The *Branti* Court, again in *dicta*, refined the definition of "policymaker," stating that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at

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[4] *See also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718 (1996): "Although no opinion in *Elrod* commanded a majority of the Court, five Justices found common ground in the proposition that subjecting a nonconfidential, nonpolicymaking public employee to penalty for exercising rights of political association was tantamount to an unconstitutional condition under *Perry v. Sindermann*."

518. The *Rutan* Court extended *Elrod*'s prohibition on patronage dismissals "to promotion, transfer, recall, and hiring decisions based on party affiliation and support." *Rutan*, 497 U.S. at 65. *O'Hare* extended *Elrod* protections to independent contractors for the government. *O'Hare Truck Serv., Inc.*, 518 U.S. at 726.

Thus, the primary explication of the policymaker exception has been set forth in *dicta* and none of the cases applied the policymaker exception. The Court's decisions have provided no clear guidelines for application of the policymaker exception, leaving development of such guidelines to the Circuit Courts of Appeal. In the thirty years since *Elrod* was decided, the Circuit Courts have struggled to formulate standards for application of the exception. *Flynn v. City of Boston*, 140 F.3d 42, 44 (1st Cir. 1998), *cert. denied*, 525 U.S. 961 (U.S. Nov. 2, 1998) (No. 98-153), describing prior holdings as "largely a porridge of general statements and variables"; *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994 (9th Cir. 1999), stating "[i]t is difficult to determine which line of cases to apply here." In that time, situations not addressed in *Elrod*, *Branti*, *Rutan*, or *O'Hare* have arisen. While *Elrod* explicitly addressed policymaking employees' right to political affiliation, it did not consider other rights protected by the First Amendment: the right to speech and the right to intimate association. Application of the policymaker exception to cases outside the specific facts of *Elrod* and *Branti* has created confusion and multiple approaches in the Circuit Courts. Application of the exception has varied from Circuit to Circuit and fact pattern to fact pattern. That confusion has centered on the question squarely presented here: What application shall *Elrod/Branti* have in cases where a policymaker alleges violation of his or her First Amendment right to free speech?

C. The Circuit Split

There are three distinct approaches to the free speech question among the eight Circuits which have considered the question. Some courts have used a balancing test, applying the *Elrod/Branti* exception as a factor in a *Pickering/Connick* balancing. Other courts have applied a threshold test, applying *Elrod/Branti* or not depending on the content of the speech at issue. And still other courts, the Sixth Circuit's decision in *Simasko* among them, have precluded any First Amendment claims for policymaking employees. Complicating the issue still further, the Sixth Circuit has endorsed one approach and then applied another. *See infra* at pp. 14-16. And the Fifth Circuit's plurality opinion in *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992) (en banc), *cert. denied*, 504 U.S. 941 (U.S. May 26, 1992) (No. 91-1583), applied two of the three approaches. *See infra* at pp. 10-11.

1. *Applying A Balancing Test*

The Second, Third, and Fifth Circuits have applied a *Pickering* balancing test which uses the *Elrod/Branti* exception as a factor in the balancing. The relevant analysis centers wholly around the *Pickering* balancing test, with no one factor being dispositive.

a. Fifth Circuit (1984)

The Fifth Circuit Court of Appeals applies the *Pickering/Connick* balancing test, adapted for the facts of each case before it. *McBee v. Jim Hogg County, Tex.*, 730 F.2d 1009 (5th Cir. 1984). Cases involving public employees are considered on their particular facts, and "might reasonably be expected to locate themselves on a spectrum; we conclude that they do." *Id.* at 1014. This spectrum favors the employee at one end and the employer at the other, depending upon the nature of the protected activity engaged in. *Id.* at 1014-15.

The *Elrod/Branti* exception is one factor in this balancing test: "*Connick* rejects affording an employee complete freedom of speech or none at all depending either on his position or any other single factor." *Id.* at 1016. In a later case, *Kinsey v. Salado Independent School District*, the court applied the employee's position as a "high-level policymaker" and "confidential relationship" with the school board as factors in a *Pickering* balancing. Plaintiff's position made his speech more disruptive than it would have been otherwise: "In short, in light of his high-level policymaker and confidential position, Kinsey stepped over the line [and] in so doing, he abandoned any shelter otherwise provided him by the First Amendment." *Kinsey*, 950 F.2d at 996. Even so, application of this test is not without controversy in the Fifth Circuit. *Kinsey* was a plurality opinion in which the concurrence "reach[ed] the same conclusions . . . but by a different path," *i.e.*, application of the threshold test, described below. *Id.* at 997-98 (Higginbotham, J., concurring).

b. Second Circuit (1997)

The Second Circuit also applies the *Pickering* balancing test, holding that the "policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance, but not conclusive." *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999), *cert. denied*, 528 U.S. 823 (U.S. Oct. 4, 1999) (No. 98-2028) *quoting McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997). The Second Circuit explicitly rejected the Ninth Circuit's adoption of a preclusion test. *Lewis*, 165 F.3d at 162-63; *McEvoy*, 124 F.3d at 102 ("Although some courts have suggested that a dispositive policymaker exception also exists in the *Pickering* context, we reject such a notion.") (citations omitted).

c. Third Circuit (2004)

The Third Circuit most recently adopted a *Pickering* balancing test in *Curinga v. City of Clairton*, 357 F.3d 305, 309 (3d Cir. 2004): "[I]n most cases, where a confidential or policy making employee engages in speech or conduct against his public employer, the better analytical approach is found under the freedom of speech doctrine." The court, although not explicitly rejecting any particular approach, noted the Circuit split and the "somewhat different approaches" taken by other Courts of Appeals. *Id.* at 313 n.8. Applying *Pickering* to the facts before it, the Third Circuit held that the *Pickering* balance favored the employer and that plaintiff's "policy making responsibilities exempt him from *Elrod/Branti* protections." *Id.* at 313.

2. *Applying A Threshold Test*

The First, Sixth, Seventh, and Tenth Circuits apply a threshold test, inquiring into the content of the policymakers' speech, *i.e.*, whether it concerned political or policy issues. The Fifth Circuit, in Judge Higginbotham's concurrence in the plurality opinion in *Kinsey v. Salado Independent School District*, urged application of this test, although it has not been adopted in the Fifth Circuit. *Kinsey*, 950 F.2d at 997-98. The most relevant consideration in this approach is the content of the policymaker's speech. The answer to this question dictates the result of the *Pickering* balancing test.

a. First Circuit (1998)

The First Circuit applies a balancing test preceded by a threshold determination. *Flynn v. City of Boston*, 140 F.3d at 47. In *Flynn*, the Court of Appeals upheld the dismissal of two policymaking employees. "Precisely because [their] 'speech' did bear on the job and on their working relationship with [defendant], [defendant] was permitted to conclude reasonably that she did not have the necessary trust and

confidence to retain them." *Id.* at 47. A different situation would pertain, the court held, were the speech at issue not related to plaintiffs' jobs. *Id.* The "working rule" thus adopted by the First Circuit states: "[W]here the employee is subject to discharge for political reasons under the *Elrod* and *Branti* cases, a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position." *Id.*

b. Tenth Circuit (2000)

The Tenth Circuit has adopted a threshold test. Citing approvingly to the Seventh Circuit, it held that in cases involving policymaking employees' speech, the *Pickering* balancing is appropriate in those cases where "the speech at issue does not implicate the employee's politics or substantive policy viewpoints." *Barker v. City of Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000). This approach, the court held, is dictated by *O'Hare Truck Services, Inc.*, where this Court stated that in those cases "where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement . . . the balancing *Pickering* mandates will be inevitable." *Id.* at 1139, *quoting O'Hare Truck Serv., Inc.*, 518 U.S. at 719. Citing to *O'Hare*, the Tenth Circuit rejected the proposition that "a political affiliation employee can always be terminated, regardless of whether she would otherwise be entitled to the protections of the *Pickering/Connick* balancing test for any particular exercise of free speech." *Barker*, 215 F.3d at 1139. *But cf. Simas*, 417 F.3d at 562 (holding that "a hiring authority" may terminate a policymaking employee "based on 'political differences of any kind'") (citation omitted) and *Fazio v. City & County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (U.S. Apr. 20, 1998) (No. 97-1353). The *Barker* Court then reversed the trial court's grant of summary

judgment for the city, finding that the *Pickering* balancing had not been satisfied. *Barker*, 215 F.3d at 1140.

c. Seventh Circuit (2000)

The Seventh Circuit also applied a threshold test prior to utilizing the *Pickering* balancing test. In *Bonds v. Milwaukee County*, 207 F.3d 969, 979 (7th Cir. 2000), *cert. denied*, 531 U.S. 944 (U.S. Oct. 16, 2000) (No. 00-226) the Circuit Court held that the policymaker exception "does not immunize public employer action unconnected to and unmotivated by need for political loyalty." Nor does it circumvent the *Pickering* balancing where the contested speech "does not implicate the employee's politics or substantive policy viewpoints. The policymaking employee exception does not cover all employee speech, and speech unrelated to job duties or political viewpoint runs too remote from the interests that animate the exception." *Id. See also Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 973-74 (7th Cir. 2001), *cert. denied*, 537 U.S. 826 (U.S. Oct. 7, 2002) (No. 01-1874).

d. Sixth Circuit (2002)

In *Rose v. Stephens*, the Sixth Circuit applied a threshold test to what it asserted were "mixed" cases, *i.e.*, instances of actual speech intermixed with the political affiliation requirement recognized in *Elrod/Branti*. *Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir. 2002) *citing to O'Hare Truck Serv., Inc.* 518 U.S. at 719. The Sixth Circuit understood itself to be addressing only a subset of speech cases, *i.e.*, "where the employee speaks on political or policy-related issues." *Id.* In such cases, the court held, the *Pickering* balancing is adopted but as a matter of law will come out for the employer. This result, the court held, "flows logically" from the *Elrod/Branti* reasoning. "[I]t would make little sense to permit the government to preemptively dismiss employees on the basis of political affiliation alone, while

restricting its ability to respond to an overt act of disloyalty by an employee in the same position." *Id.* at 922. *But cf. Curinga*, 357 F.3d at 312 n.5 (declining to go as far as *Rose* in deciding this question). The Sixth Circuit explicitly rejected the balancing test of the Second Circuit, *see supra* at p. 11, and the preclusion test of the Ninth Circuit, *see infra* at pp. 15-16. "We do not adopt the broader position of the Ninth Circuit precisely because it is not necessarily the case that the government's interest as employer will outweigh the employee's free speech rights in all cases." *Rose*, 291 F.3d at 923 n.3. In so doing, the Sixth Circuit understood itself to be following the "underlying rationale" of *Elrod/Branti*, the government's interest in having loyal employees occupying policymaking and confidential positions. *Id.* at 922. Nonetheless, despite the court's holding in *Rose*, the Sixth Circuit has not uniformly applied this test. In *Simasko*, the court applied the preclusion test adopted by the Ninth Circuit. *See infra* at p. 16.

3. *Applying A Preclusion Test*

a. Ninth Circuit (1997)

The Ninth Circuit has adopted a standard which precludes any First Amendment protection for policymaking employees. The Court first recognized that in cases alleging violation of free speech rights, the *Pickering* balancing test applies. *Fazio*, 125 F.3d at 1331. However, the court further held, *Elrod* established an exception to this general rule. *Id.* As the court summarized: "[A] public employee's claim that he or she was fired for exercising his or her First Amendment speech rights would generally be analyzed using the *Pickering* balancing test. If, however, a public employee is a policymaker, the claim would fall under the rubric of *Elrod* and *Branti*." *Id.* at 1332. For the Ninth Circuit, the most relevant question is whether the employee occupies a policymaking position. If the answer is no, the employee gets the

benefit of the *Pickering* balancing test. If the answer is yes, the employee does not. *Id.* at 1332, 1334. *See also Biggs*, 189 F.3d at 994-95 ("[A]n employee's status as a policy-making or confidential employee would be dispositive of any First Amendment retaliation claim.").

b. Sixth Circuit (2005)

The Sixth Circuit, although adopting the threshold test in *Rose*, nonetheless in effect applied a preclusion test in *Simasko*. The panel made no inquiry into the content of Simasko's speech—an inquiry required by the *Rose* opinion. *Rose*, 291 F.3d at 921-22. Rather, the *Simasko* Panel held that "the Elrod/Branti Exception has been interpreted to permit a hiring authority to terminate a policymaking or confidential employee based on 'political differences of any kind.'" *Simasko*, 417 F.3d at 562 *quoting Williams v. City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990). The *Rose* panel chose to provide additional protections for the political speech of policymaking employees, *see supra* at pp. 14-15, a distinction the *Simasko* panel ignored. In so doing, the Sixth Circuit applied the broader preclusion rule of *Fazio*.

4. *Further Development In The Courts Of Appeal Is Not Warranted And The Relevant Issue Is Clearly Presented By The Facts Of This Case*

The varied tests applied by the Circuit Courts are premised on essentially different understandings of the scope of the *Elrod/Branti* exception and its proper place in First Amendment precedents, including the *Pickering/Connick* cases.[5]

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[5] *See* Singer, Craig D., "Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation," 59 *U. of Chicago L. Rev.* 897, 898 (1992): "The existence of two separate doctrines for similar situations has confounded lower courts. Courts differ on how to approach cases [where] both overt speech and political affiliation

See Biggs, 189 F.3d at 994 ("It is difficult to determine which line of cases to apply here."); *Curinga*, 357 F.3d at 309 ("[T]he various courts of appeals have divided over whether to employ an analysis based on freedom of speech or on freedom of association."). In applying a balancing test, several courts give primacy to this Court's decisions protecting free speech, situating the *Elrod/Branti* exception as one relevant factor in the requisite balancing. In applying a threshold test, other courts give predominance to the underpinning of the policymaker exception, the government's interests in loyal employees who will carry out its policies faithfully. Finally, by using *Elrod/Branti* to preclude all First Amendment claims, other courts apply *Elrod/Branti* as nothing more than a sorting tool to decide which employees are protected and which are not.

The different tests also provide different answers to the First Amendment question: Does policymaker speech merit consideration under this Court's free speech jurisprudence? The answers are, respectively, yes, sometimes, and no. The balancing test includes all speech within its scope. The threshold test considers some speech within its purview, but not other speech, based on the content of the speech. The preclusion test, applying *Elrod/Branti* to the exclusion of all other First Amendment jurisprudence, excludes all speech from consideration, and thus any possibility of protection.

Leaving this question to the Circuit Courts for further percolation is not necessary. The Circuit split is clear. Both the Second Circuit and the Sixth Circuit have explicitly rejected the approaches of their sister courts. *Lewis*, 165 F.3d at 162; *Rose*, 291 F.3d at 923. The Third Circuit, while not

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may have played a role in the employer's decision to fire the public employee. Which test the court will apply depends primarily on the court's view of the relationship between the two lines of Supreme Court precedent."

explicitly rejecting other approaches, has recognized the Circuit split. The Circuit split has lasted well over a decade. The Fifth Circuit adopted its test in 1984, *McBee*, 730 F.2d at 1014-16, shortly after *Branti* was decided. And, as other Courts have considered the question, the Circuit split has persisted. The Sixth Circuit discussed the split in 2002, *Rose*, 291 F.3d at 920-23, and the Third Circuit recognized the split as recently as 2004, *Curinga*, 357 F.3d at 313 n.8. Finally, the Circuit split involves a majority—eight of thirteen—of the Circuit Courts of Appeal.

The case now before this Court encompasses the exact question presented by the Circuit split: what test shall apply in cases where a policymaking employee contends that his exercise of his free speech right led to, in whole or in part, an adverse employment action against him? The issue is unambiguously presented by the facts of this case. Stephen Simasko was terminated because he exercised his right to free speech protected by the First Amendment. Simasko was constructively discharged after he refused to provide public support for his co-worker in a general election for a non-partisan judgeship. The questions most central to the Circuit split are thus most central to resolution of this matter: should a threshold test apply which would consider whether Simasko's speech was related to his job and policymaking duties, *i.e.*, did Simasko's speech implicate the loyalty concerns recognized by *Elrod/Branti*? Should a balancing test apply which would consider Simasko's right to engage in speech as to public matters as against the government's interest in loyalty and effectiveness? Or, has Simasko, by virtue of occupying a policymaking position, forfeited all First Amendment protections to which he would otherwise be entitled? The case on appeal presents the issue squarely: A Circuit Court split exists on the application of the *Elrod/Branti* exception *vel non* to actual speech by government employees who occupy policymaking positions. How far

does *Elrod/Branti* intrude on a policymaking employee's rights protected under the First Amendment?

II. REVIEW IS WARRANTED TO DECIDE AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW CONCERNING APPLICATION *VEL NON* OF THE POLICYMAKER EXCEPTION TO A POLICYMAKING EMPLOYEE'S CLAIM FOR VIOLATION OF HIS RIGHT TO INTIMATE ASSOCIATION

A. The Right To Association

The protections afforded by the First Amendment to the right of association are set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The *Roberts* Court identified two aspects of the right: the right to expressive association and the right to intimate association. In describing the protection of intimate association, the Court held that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State" because the freedom of association is "a fundamental element of personal liberty." *Id.* at 617-18 (emphasis added).

The *Roberts* Court described the right of expressive association as "a right to association for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. The Court explained that these individual freedoms are protected by a Constitutionally guaranteed "freedom to engage in group effort toward those ends," also described as "protection to collective effort on behalf of shared goals." *Id.* at 622. As the *Roberts* Court stated: "We have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 623.

However, the *Roberts* Court held, "[t]he right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. The Court's prior holdings in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), are consistent with its later holding in *Roberts*. In *Elrod* and *Branti*, the Court accepted restrictions on the right of expressive association to serve a compelling state interest.

B. The *Elrod/Branti* Exception Addresses The Right Of Expressive Association

The *Elrod* and *Branti* Courts addressed only public employees' right of political association, what *Roberts* later explicated as the right of expressive association. The *Elrod* Court defined its concern as "the impact of patronage on *political belief and association*" because "*political belief and association* constitute the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356 (emphasis added). The plurality opinion spoke of protection for "political association," "freedom to associate with others for the common advancement of political beliefs and ideas," and "[t]he right to associate with the political party of one's choice." *Id.* at 356-57 (citations omitted). *See also O'Hare Truck Serv., Inc.*, 518 U.S. at 718.

The *Elrod* Court, while protecting public employees from termination on the basis of political association, created an exception for policymaking employees. Accepting the government's need for politically loyal employees to ensure implementation of government policy, the Court stated that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Elrod*, 437 U.S. at 367, 372. *See also Branti*, 445 U.S. at 517: "[P]arty

affiliation may be an acceptable requirement for some types of government employment." Thus, while *Elrod/Branti* burdened policymaking employees' right to political affiliation, it did not consider policymaking employee's *other* rights protected by the First Amendment, in this case the right to intimate association. This judicial restraint is consistent with the compelling state interest identified by *Elrod*. A policymaking employee's intimate associations may have only the most tenuous connection, or no connection at all, to his or her political loyalty. The holding in *Elrod* is also consistent with a "fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984). *Simasko*, however, presents the constitutional issue squarely and concisely: what protection, if any, will be afforded policymaking employees' intimate associations?

C. The Sixth Circuit's Decision Deprives Policymaking And Confidential Employees Protection In Their Intimate Associations

The Sixth Circuit characterized Simasko's intimate association claim as "perforce that Simasko was fired because of his brotherly association with a supporter of Kelly's opponent." *Simasko*, 417 F.3d at 564. The court continued, holding that Simasko's "claim is properly characterized as one based on Simasko's association (perhaps even a refusal to break off an association) with the supporter of a political opponent. Such an association is covered by the *Elrod/Branti* exception." *Id.* Moreover, the court continued, Simasko's termination was based both on his affiliation with his brother *and* his "failure even to *attempt* to curtail his brother's public support of Kelly's opponent in the campaign." *Id.* Simasko's failure to "comply with the political wishes of Kelly" and "his failure to prevent his brother from supporting a candidate opposed by George," the court concluded, "could have caused

George to question Simasko's loyalty and, pursuant to the *Elrod/Branti* exception, was a valid reason for which to terminate Simasko." *Id.* at 564-65.

Simasko's association with his brother is an intimate association, not a political affiliation, as distinguished by *Roberts*. *Roberts*, 468 U.S. at 617-18. The Sixth Circuit's holding simply extends the *Elrod/Branti* exception to Simasko's intimate association with his brother based on political activities unconnected to Simasko by any other avenue. In so doing, the Sixth Circuit deprives policymaking employees of any protection in their intimate associations—so long as the employer can find any partisan "loyalty" justification, no matter how tenuous or far removed from the workplace or requirements of the employee's position.

But the *Simasko* court goes even further: it requires policymaking employees to not only tolerate State interference in their intimate relationships, but to *facilitate* such interference in order to keep their jobs. Respondents intruded on Simasko's intimate association with his brother when they demanded that Simasko prevail upon his brother to conform his political speech and affiliation to their partisan political agenda. When Simasko did not comply, Respondents further intruded on his intimate association and terminated him. Respondents' aim was purely to coerce the political support of Simasko's brother via threat to Simasko's job. The Sixth Circuit allowed such coercion under cover of the *Elrod/Branti* exception.

But Respondents' pursuit of this unconstitutional coercion of political speech and activity through intrusion into Simasko's intimate association with his brother is not excused by Simasko's position as a policymaking employee. Simasko's brother is not a policymaking employee. There is no compelling State interest that requires his political affiliation to conform to that of Simasko's State employer. There is no loyalty justification which allows the State to

interfere with the intimate associations of its policymaking employees in order to coerce third-party political support for its partisan agenda.

III. REVIEW IS WARRANTED BECAUSE THE CIRCUIT COURT'S APPLICATION OF THE POLICYMAKER EXCEPTION IS IN CONFLICT WITH THIS COURT'S DECISIONS

The *Simasko* decision conflicts with this Court's precedent on important issues of free speech and intimate association. *See supra* at pp. 19-23. It also conflicts with the Court's opinions in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980).

A. Free Speech And Freedom Of Association

As set forth above, the Circuit Court's decision in *Simasko* conflicts with Supreme Court precedent establishing freedom from undue governmental intrusion into one's intimate associations. *Roberts*, 468 U.S. at 617-18. The Circuit Court's decision also conflicts with Supreme Court precedent establishing protections for free speech. Public employees have a constitutionally protected right to free speech, *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142, and their employment may not be conditioned on an infringement of that right. *Keyishian*, 385 U.S. at 605-06. U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1. Further, this Court has not recognized any exceptions to the *Pickering* balancing test and the protections afforded thereby. *See O'Hare Truck Serv., Inc.*, 518 U.S. at 719: "Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*" By applying *Elrod* to the complete exclusion of *Pickering* protections, *Simasko* deprives policymaking em-

ployees of any protection for the exercise of their free speech rights.

B. *Elrod* And *Branti*

There are two animating principles to the policymaker exception: constitutional antipathy to the restraints imposed by the patronage system and the government's need for politically loyal policymaking employees. *Elrod*, 427 U.S. at 356-57, 367, 372. The Sixth Circuit's *Simasko* decision ignores both these principles.

The *Elrod* Court held that patronage dismissals of non-policymaking public employees infringes First Amendment protections for freedom of belief and association. *Elrod*, 427 U.S. at 357-58. The constitutional antipathy to patronage was well articulated by the *Elrod* Court. The patronage system "to the extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Id.* at 357 (citation omitted). The Court described the restrictions to their First Amendment rights imposed on employees subject to patronage systems:

> An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs.

Id. at 355-56 (citation omitted). The restrictions are no less when they are imposed on the intimate associates of public employees.

Where the State interferes with the intimate associations of its employees for partisan political purposes, requiring employees, at risk of their jobs, to prevail upon, or even merely "attempt" to prevail upon, their family members to refrain from working on behalf of opposition parties and candidates, those family members put their loved one at risk by maintaining their affiliations with their chosen party or candidates. Accordingly, family members may feel induced to provide financial and campaign assistance to a party or candidate they do not support in order to keep their loved one from suffering termination or other job detriments. It is not hard to see that the threat of job sanctions to a loved can press private citizens "to conform their beliefs and associations to some state-selected orthodoxy" in detriment to the exercise of their own First Amendment rights. *Rutan*, 497 U.S. at 75.

The Sixth Circuit's decision in *Simasko* sanctions State intrusion into intimate associations for the State's own political ends. *Simasko* effectively extends the patronage system to private citizens who have an intimate association with policymaking employees. Such governmental intrusion, if allowed, could chill private citizens' exercise of their own First Amendment rights to free speech and association. This is exactly the end Respondents sought through intrusion into Simasko's intimate relationship. By threat to Simasko's livelihood, Respondents made a concerted effort to force Simasko's brother to relinquish his First Amendment rights to political association and free speech.

The *Elrod* Court also articulated the harms done to "[t]he free functioning of the electoral process" by patronage systems. *Elrod*, 427 U.S. at 356. The patronage system "prevents support of competing political interests," "starve[s] political opposition by commanding partisan support, financial and otherwise," and "tips the electoral process in favor of the incumbent party." *Id.* Likewise, conditioning employment on the coerced partisan support of an employee's

intimate associates prevents support of competing political interests. It deters the employees' intimate associates from supporting candidates in opposition to the State, however the State chooses to define opposition. Indeed, this was the very end Respondents sought: that Simasko's brother would withdraw his support for Kelly's opponent, thus tipping the electoral process in favor of Kelly, in effect the State-supported judicial candidate.

Despite the harms of patronage, the *Elrod* plurality held that "prohibition on the encroachment of First Amendment protections is not an absolute." *Elrod*, 427 U.S. at 360. However, any impairment of these protections "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* at 363. The "vital government end" justifying infringement of the right to political affiliation is "the need for political loyalty of employees . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration." *Id.* at 367.

The need for loyalty, however, is not without limits. First, it is limited to policymaking employees. *Elrod*, 427 U.S. at 367. Second, there must be a governmental interest at stake. As the *Elrod* Court stated, "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice." *Id.* at 362. As reiterated in *Branti*, patronage dismissals are "justified only if they [advance] a governmental, rather than a partisan, interest." *Branti*, 445 U.S. at 517 n.12. Moreover, the means chosen to further the interest must be "closely drawn to avoid unnecessary abridgement" of constitutional freedoms. *Elrod*, 427 U.S. at 363 *quoting Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

In *Simasko*, the Sixth Circuit made little effort, beyond bald assertion, to connect Simasko's exercise of his rights to

speech and intimate association to any governmental, as opposed to partisan, interest. Rather, the Circuit Court substituted George's and Kelly's partisan interest in Kelly's election for an appropriate governmental loyalty interest. The connection between Simasko's speech, *i.e.*, his neutrality in the judicial race, and his failure to coerce his brother's political activities, bears a tenuous connection (if any connection at all) to the government's interest in loyalty identified in *Elrod*.

The Sixth Circuit's assertion that Simasko's neutrality in the judicial race implicated legitimate governmental loyalty interests is belied by the facts of the case. First, Simasko ran against Kelly in the primary election. This, apparently, did not impinge on interests of the Prosecuting Attorney's office. Simasko was allowed to run against his supervisor with no adverse action taken against him. How, then, can Respondents claim a governmental, rather than a partisan, interest when Simasko chose to remain neutral as to Kelly's candidacy? It is difficult to ascertain how Simasko's neutrality is more disloyal than his outright opposition. Second, the position to which Simasko and Kelly were seeking election was a non-partisan judicial seat. That it was a non-partisan judicial race undermines any contention that political affiliation, as contemplated by *Elrod* and its progeny, was, in fact, the dispositive issue. Rather than being motivated by the government's need for loyal policymakers, as allowed by *Elrod* and its progeny, Respondents were motivated by improper partisan concerns. The only interest at stake was George's and Kelly's personal, partisan interest in seeing Kelly elected to a judicial seat, which is not a compelling state interest under *Elrod*'s analysis.

Indeed, the *Simasko* decision is based on an interpretation of *Elrod/Branti* that is so broad as to do away with the compelling governmental interest entirely. The Sixth Circuit has gone far beyond the "least restrictive" and "closely drawn" limitations of *Elrod* and its progeny. The *Simasko*

court itself stated the policymaker exception as allowing terminations "for politically-motivated reasons." *Simasko*, 417 F.3d at 562. It did so based on the Sixth Circuit's holding in *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002), applying *Elrod/Branti* to speech cases, and the Sixth Circuit's footnote statement in *Williams v. City of River Rouge*, 909 F.2d at 153 n.4, that a policymaker may be terminated based on "political differences of any kind." *Simasko*, 417 F.3d at 562. This is far too broad a reading of the *Elrod/Branti* exception. The compelling governmental interest recognized by *Elrod* is the "need to insure that policies which the electorate has sanctioned are effectively implemented." *Elrod*, 427 U.S. at 372. Loyalty, therefore, is a means to an end, not an end in itself. The government can have no interest in political loyalty in the abstract, loyalty which is unrelated to the policymakers' employment or duties. In short, the Sixth Circuit opinion in *Simasko* applies the preclusion test adopted by the Ninth Circuit. Not only does this create conflict within the Sixth Circuit, it further widens and deepens the conflict among the Circuit Courts on these important constitutional questions.

CONCLUSION

This Court's jurisprudence regarding the scope and application of the policymaker exception has provided little guidance to the Circuit Courts of Appeals. Over the preceding thirty years the Circuit Courts have struggled to create standards for application of the exception. What has emerged is a clear split amongst the Circuit Courts as to the scope of the *Elrod/Branti* exception, its proper place in First Amendment jurisprudence, and its application to claims asserting violation of employees' right to free speech. Each of the different approaches taken by the Courts of Appeals has struggled to reconcile and integrate competing interests, distinct Court rulings, and related First Amendment protections.

The *Simasko* court has been the least successful in this task. Applying the policymaker exception as nothing more than a crude sorting tool, ignoring the principles and holdings of *Elrod* and *Branti*, the Sixth Circuit has deprived policy-making employees of any First Amendment protection. In so doing, the Sixth Circuit has sanctioned State interference in its employees' intimate associations to advance the State's own partisan, political interests. The *Simasko* court has widened and deepened an already significant Circuit split on this constitutional issue.

For all the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Simasko v. County of St. Clair*, 417 F.3d 559 (6th Cir. 2005).

Respectfully submitted,

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January 18, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 04-2292

STEVEN L. SIMASKO,
Plaintiff-Appellee,

v.

COUNTY OF ST. CLAIR, a Municipal Corporation,
Defendant,

PETER R. GEORGE, individually and in his official capacity as St. Clair County Prosecutor; MARY ROY KELLY, jointly and severally,
Defendants-Appellants.

Argued: April 19, 2005.
Decided and Filed: Aug. 3, 2005.

Before: BOGGS, *Chief Judge*; RYAN and ROGERS, *Circuit Judges*.

ROGERS, *Circuit Judge*.

The defendants appeal the district court's denial of their motion for summary judgment based on a defense of qualified immunity in this 42 U.S.C. § 1983 action. Because the defendants' actions in this case did not violate the Constitution, the denial of summary judgment is reversed.

I. Background

The plaintiff, Steven Simasko, worked for eighteen years as an assistant prosecutor for St. Clair County, Michigan. During all times relevant to this case, defendant Peter George

was the county attorney for St. Clair County and defendant Mary Kelly was the chief assistant prosecutor, appointed by Peter George. As the chief assistant prosecutor, Kelly was Simasko's co-worker and immediate supervisor.

In 2002, Simasko and Kelly both announced their intention to run for a judicial vacancy in the 72nd Michigan Judicial District Court in St. Clair County. George supported Kelly in the race. After the primary, Kelly was one of the top-two vote getters, while Simasko was not. Upon learning of Simasko's defeat, Kelly telephoned Simasko and asked if he would publicly support her in the election. Kelly testified that Simasko answered "something to the effect he didn't have a dog in the race, he was just tired and he just needed to sit back and not do anything." Kelly asked Simasko for his support a second time, this time at the office. During this second solicitation, Kelly informed Simasko that she was displeased with his brother's support of her opponent in the election. Simasko claims that Kelly told him that if his brother continued to support her opponent, she would expect Simasko to support her campaign publicly. Simasko also claims that Kelly asked "does he [Simasko's brother] realize what's going to happen to his practice?" Simasko's brother is an attorney with a local practice in St. Clair County. In response, Simasko again told Kelly that he did not wish to support either candidate in the race. As Kelly left Simasko's office, Simasko claims that Kelly told him "this won't be a nice place for you to work."

Simasko was later approached by another co-worker, Senior Assistant Prosecutor Joe McCarthy, about the Kelly campaign. McCarthy allegedly told Simasko that he needed to curtail his brother's support of Kelly's campaign, reminded Simasko that Kelly was his supervisor, and asked whether Simasko's brother knew the ramifications of his actions. Simasko again reiterated that he did not wish to take a position in the election.

In November of 2002, Kelly learned that she had lost the election for district court judge to her opponent. After learning of this loss, Kelly told a group of people that "that fucking Simasko is done."

On December 4, 2002, Simasko met with Kelly and George, the County Attorney, for an annual performance evaluation. Simasko claims that this was the first occasion in his eighteen years of working at the office that he had been subjected to a substantive performance evaluation. During the evaluation, George and Kelly complained that they were unhappy with Simasko's performance on several cases that year.[1] Soon thereafter, Simasko was told by George that he was "strongly considering" demoting him and decreasing his salary by approximately $20,000. Simasko claims that, after learning of the possible demotion, he wrote to George and informed him that, should George decide to go through with the demotion, Simasko would treat the action as a constructive discharge pursuant to a collective bargaining agreement between the parties. In response, George informed Simasko that he did intend to go through with the demotion. Simasko then wrote a second letter to George, again stating that Simasko found the pay decrease to be unacceptable and that he was treating the action as a constructive discharge. Simasko subsequently resigned from his position with the county.

After resigning from his position, Simasko brought suit pursuant to 42 U.S.C. § 1983, alleging that he was constructively discharged in retaliation for the exercise of his First Amendment rights of free speech and association. The defen-

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[1] Although both Simasko's and the defendants' briefs go into great detail about whether Simasko's alleged mishandling of cases resulted in his demotion, such an inquiry is unnecessary since, for purposes of this appeal, we must take Simasko's version of the facts as true—i.e., that he was fired as a result of his refusal to support Kelly's campaign and as a result of his brother's support of Kelly's opponent.

dants claim that they were entitled to fire Simasko based upon his refusal to participate in Kelly's campaign because Simasko is a policymaking employee subject to the *Elrod/Branti* exception, which allows public employees in policymaking positions to be fired for their political or policy views without violating the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). The district court, however, found that the *Elrod/Branti* exception did not apply "in this particular case, to this particular plaintiff" because Simasko did not engage in "any overt speech or political activity," but rather simply refused to act or support a particular candidate. The district court accordingly denied the defendants' motion for summary judgment based on a defense of qualified immunity.

II. Analysis

The defendants' actions leading to Simasko's termination did not violate the Constitution; thus, the defendants are entitled to qualified immunity and the denial of summary judgment is reversed.

The doctrine of qualified immunity protects government officials who perform discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). A denial of summary judgment based on a determination that the defendant is not entitled to qualified immunity may be reviewed on interlocutory appeal. *Solomon v. Auburn Hills Police Dept.*, 389 F.3d 167, 172 (6th Cir.2004). Because the availability of qualified immunity is a legal question, the decision of the district court is reviewed *de novo*. *Id.* (citation omitted). "[T]o the extent that there is disagreement about the facts . . . we must review the evidence in the light most favorable to the Plaintiffs, taking all inferences in their

favor." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900 (6th Cir.2004).

In determining whether a grant of qualified immunity is proper, we determine first whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). In this case, the defendants' actions did not violate the Constitution, and accordingly we need not reach the remaining elements of the test for qualified immunity.

Simasko was allegedly fired for refusing to support the campaign of his supervisor for a district court judgeship, and for refusing to try to curtail his brother's public support of his supervisor's opponent in the election. Because Simasko's job as an assistant county attorney qualified as a policymaking position subject to the *Elrod/Branti* exception, he could be fired for his political or policy views without violating the First Amendment. Accordingly, the defendants are entitled to qualified immunity.

A. Simasko's Decision to Remain Neutral in the Campaign

The defendants' constructive discharge of Simasko based on his decision to remain neutral in Kelly's campaign for judge, however misguided and vindictive that action may have been, did not violate the Constitution. While the First Amendment prohibits the politically-motivated dismissal of many governmental employees, the Supreme Court recognized in *Elrod*, 427 U.S. at 367-68, 96 S.Ct. 2673 (1976) (plurality opinion), and in *Branti*, 445 U.S. at 517-18, 100 S.Ct. 1287 (1980), that public employees in "policymaking or confidential positions" may be terminated for politically-motivated reasons without violating the First Amendment. The *Elrod/Branti* exception applies not only to discharges based on political affiliation, but also to terminations based

on actual speech. *See Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir.2002). Furthermore, the *Elrod/Branti* exception has been interpreted to permit a hiring authority to terminate a policymaking or confidential employee based on "political differences of any kind." *Williams v. City of River Rouge*, 909 F.2d 151, 153 n. 4 (6th Cir.1990).

In this case, Simasko was employed in a policymaking or confidential position. In *Branti*, the Court elaborated on the "policymaking or confidential" requirement, stating that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U. S. at 518, 100 S.Ct. 1287. In *Monks v. Marlinga*, 923 F.2d 423, 426 (6th Cir.1991), we held that an assistant county prosecutor is properly considered a policymaking or confidential employee under Michigan law and that political affiliation is an appropriate consideration in the discharge of such an employee.

Simasko argues that his termination does not fall within the *Elrod/Branti* exception because he did not actively oppose his supervisor in her race for a district court judgeship, but instead only remained neutral in the election. This argument lacks merit. The government has an important interest in securing employees who will loyally implement the policies of its democratically elected officials. The Supreme Court has found force in the argument that politically loyal employees are necessary "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the . . . administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367, 96 S.Ct. 2673 (plurality opinion). Our court, moreover, has indicated that "the government's interest in appointing politically loyal employees to certain positions converges with its interest in operating an efficient workplace when dealing with policy-

making employees because loyalty by those employees is an essential requirement for the efficient functioning of the workplace." *Rose*, 291 F.3d at 923. In this case, George supported Kelly, Simasko's supervisor, in her campaign for a district court judgeship. Simasko's decision not to support George's choice for the district court judgeship election was sufficient to implicate loyalty concerns that could have caused George to lose confidence in Simasko. As we recognized in *Latham v. Ofice of Att'y Gen. of State of Ohio*, 395 F.3d 261, 266-67 (6th Cir.2005), the mere fact that an employee is affiliated with an opposing political party, however quietly, can cause the employer not to trust the employee to implement fully the employer's practices. Accordingly, because Simasko was a policymaking or confidential employee, the defendants' constructive discharge of Simasko based on his failure to support Kelly's campaign did not violate the Constitution.

This conclusion is supported by the Seventh Circuit's holding in *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir.1993). In that case, a probationary deputy sheriff was fired after he refused to comply with a policy requiring all probationary employees to participate in the sheriff's campaign for re-election. *Id.* at 86. The deputy sheriff filed suit alleging that the termination, and the policy itself, violated his First Amendment rights. *Id.* Although the court had previously held that a deputy sheriff was properly labeled a policy-making or confidential employee, the deputy argued that political neutrality was not a proper basis for his termination because it "did not affect his loyalty or ability to enforce the law . . . as his employer saw fit." *Id.* at 87. The court rejected the deputy's argument, however, and held that, because the sheriff used "political considerations in deciding that [the deputy's] refusal to campaign on his behalf could hinder the effective performance of the department," the termination did not violate the Constitution. *Id. See also Mitchell v. Thompson*, 18 F.3d 425, 426-27 (7th Cir.1994) (holding that

defendants were entitled to qualified immunity for demoting deputy sheriff based on his decision to remain neutral during the sheriff's re-election campaign).

While this court has recognized that terminating employees based solely on their political beliefs may seem "draconian at first glance," such a result is less troubling when one recalls that, pursuant to the *Elrod/Branti* exception, a policymaking employee can be fired simply for supporting a political party different from that of his employer, even if that employee never evidences any policy disagreement with his employer. *Latham*, 395 F.3d at 266-67; *see also Williams*, 909 F.2d at 153 n. 4 (stating that the reasoning for the *Elrod/Branti* exception has been "understood to apply to political differences of any kind"). The defendants' actions leading to the termination of Simasko based on his decision to remain neutral in Kelly's campaign for judge did not violate the First Amendment, and the defendants are entitled to qualified immunity on that claim.

B. Simasko's Failure to Prohibit His Brother's Support of Kelly's Opponent

Simasko also claims that his constructive discharge was a result of his brother's public support for Kelly's opponent in the judicial race, in violation of Simasko's First Amendment right to freedom of association. This contention fails upon close examination of the nature of the claim.

Simasko does not claim that he was fired because he and his brother were brothers, something obviously not within Simasko's power to change. Instead, the claim is perforce that Simasko was fired because of his brotherly association with a supporter of Kelly's opponent. To the extent that this claim implicates Simasko's First Amendment rights (as opposed to those of his brother), the claim is properly characterized as one based on Simasko's association (perhaps even a refusal to break off an association) with the supporter of a political

opponent. Such an association is covered by the *Elrod/Branti* exception.

In *Sowards v. Loudon County*, 203 F.3d 426 (6th Cir. 2000), this court indicated, albeit in dictum, that the *Elrod/Branti* exception permits hiring authorities to terminate policymaking or confidential employees for their association with political opponents without violating the First Amendment. In *Sowards*, a jailer alleged that she was terminated after her husband ran and lost the election for sheriff of the county, and that the termination violated her First Amendment rights to intimate and political association. *Id.* at 432. The defendants in the case claimed that, even if the jailer were able to show that she was fired because of her political association with her husband, the termination was justified because the position of jailer should be considered a policy-making position for which political affiliation is an appropriate consideration. *Id.* at 435. Although the court found that the position of jailer was not a policymaking position, *id.* at 438, we indicated that if an employee *is* in a policymaking position, "then political affiliation is an appropriate consideration for that position and a public employee may be dismissed without violating the First Amendment." *Id.* at 436. Accordingly, because Simasko is a policymaking employee, the defendants' constructive discharge of Simasko based on Simasko's affiliation with his brother's political activities did not violate the Constitution.

Furthermore, Simasko's termination was based not just on his affiliation with his brother, but also on Simasko's failure even to *attempt* to curtail his brother's public support of Kelly's opponent in the campaign. The failure of Simasko to comply with the political wishes of Kelly, his supervisor, and his failure to try to prevent his brother from supporting a candidate opposed by George could have caused George to question Simasko's loyalty and, pursuant to the *Elrod/Branti* exception, was a valid reason for which to terminate Simasko. Accordingly, there was no constitutional violation in this case.

III. Conclusion

The defendants did not violate the Constitution by constructively discharging Simasko based either on his decision to remain neutral in his supervisor's campaign, or based on Simasko's failure to attempt to curtail his brother's support of his supervisor's opponent. The defendants are accordingly entitled to qualified immunity and the denial of summary judgment is REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed Sept. 15, 2004]

Civil Action No. 03-CV-73145-DT

STEVEN L. SIMASKO,

Plaintiff,

v.

COUNTY OF ST. CLAIR, *et al.*,

Defendants.

HON. BERNARD A. FRIEDMAN

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On September 8, 2004, this matter came before the court on defendants' motion for summary judgment. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDERED that defendants' motion for summary judgment is granted as to Count II–Discharge in Violation of Public Policy, Count III–Defamation, and Count IV–Intentional Interference with a Business Relationship, as to defendants County and George only.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is denied as to Count I–Violation of 42

U.S.C. § 1983 and Count IV–International Interference with a Business Relationship, as to defendant Kelly only.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
Chief United States District Judge

Dated: Sept. 15, 2004
Detroit, Michigan

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed Dec. 14, 2004]

Case Number: 03-73145

STEVEN L. SIMASKO,

Plaintiff,

v.

COUNTY OF ST. CLAIR, a Municipal Corporation, PETER R. GEORGE, individually and in his official capacity as St. Clair County Prosecutor, and MARY ROY KELLY, jointly and severally,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

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238 U.S. Courthouse & Federal Building
231. West Lafayette Boulevard
West Detroit, Michigan 48226

WEDNESDAY, SEPTEMBER 8th 2004

APPEARANCES:

For the Plaintiff: Kathleen L. Bogas, Esq.

For the Defendant: William L. Fealko, Esq.

Court Reporter: Joan L. Morgan, CSR
Official Court. Reporter

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Wednesday, September 8th, 2004 Detroit, Michigan

[2] THE CLERK: Simasko versus County of St. Clair, case number 03-73145.

THE COURT: Good afternoon.

MS. BOGAS: Your Honor, I have my client here, but there's no necessity for him to sit at counsel table; is there?

THE COURT: He may sit wherever he likes.

MS. BOGAS: Thank you.

THE COURT: You're more than welcome to sit at counsel table. Whatever makes you happy.

Counsel?

MR. FEALKO: May it please the Court, your Honor, Bill Fealko, appearing on behalf of the defendants, Peter George, Mary Kelly and the St. Clair County.

THE COURT: And plaintiff?

MS. BOGAS: Kathleen Bogas, for the plaintiff, Steven Simasko.

THE COURT: Thank you.

Okay, this is the Defendants' Motion for Summary Judgment. You may proceed.

MR. FEALKO: Thank you, your Honor.

I appreciate that there is rather a lengthy [3] explanation of the factual background, and I'm not going to deal with that at great length. I'm going to touch on a couple of things, your Honor.

Peter George was appointed the Prosecutor in 1999. Unfortunately, Mr. Peter George won't be here today because of a reconcilable conflict.

In 2000, he was elected as the Prosecutor. Mary Kelly, who is here present, was appointed the Chief Assistant for him.

In 2001, Peter George adopted a performance based management system. One of the senior assistant prosecuting attorneys who was appointed underneath Mr. George, underneath Ms. Kelly, is the plaintiff in this case.

Plaintiff was in an at-will position. Plaintiff acknowledges that position required a great deal of trust and confidence on behalf of the Prosecuting Attorney.

When the performance based management system was adopted, there was kind of a seat change, if you will, as to how the approach was going to be in the office. Prior to that, annual evaluations were conducted, but they weren't conducted in any type of substantive manner. It was more kind of—as I think the plaintiff actually stated in his deposition as an "atta boy, things are going well" and things continued to move along.

Under the new system, the focus was not going to [4] be seniority any more, but rather, the pay that was provided, and the assignments that were given to the various assistant prosecuting attorneys was going to be predicated and based on an individual's performance.

Plaintiff, actually testified, he understood that following his performance evaluation, there were no guarantees. He could stay; he could be fire; or he could be demoted.

Now, in 2002, there was a judicial opening in the 72nd District Court in Michigan, and what happens is we have a variety of applicants, certainly four different people who sought that position including Mary Kelly and the plaintiff. Now, the plaintiff lost in the primary and Mary Kelly lost in the general election. That was in November of 2002.

Peter George, subsequently is preparing for the performance evaluation of all of the assistants including plaintiff. In

preparing for that performance, he discovered a couple of cases, three in particular, that caused him serious concern about plaintiff's performance, and those are discussed at length in the brief, and I'm not going to continue that discussion other than to note the names of the cases are Konefe, Donaghy and Herbert. And if the Court has any questions about the specific issues of each one, I would be happy to answer.

[5] THE COURT: I don't.

MR. FEALKO: After reviewing these three files, Peter George is now concerned that maybe he has somebody not only that, he can't trust to handle the serious cases in the circuit court, but it may be somebody that he can't even trust to handle anything on behalf of him. And he explains to Mary Kelly, he's seriously considering at this point in time, terminating plaintiff's employment.

At this point, Mary Kelly intervenes and says, well, you know, we've had issues with other assistant prosecuting attorneys, and she gives examples of them, and counsel make references to each of those in both of our respective briefs.

In both of those instances, we identify the performance deficiencies for the individuals, taken action with respect to either a demotion or a holding the person off on a promotion which had the effect of reducing both of their pay; gave them an opportunity to correct those deficiencies. Both of those people responded positively and both were then reestablished in their prior positions.

So Mr. George conducts the performance evaluation of plaintiff, and told him the next day that based upon these issues that he discussed, the three cases in particular, plaintiff was going to reassigned to the district court assignment from the circuit court [6] assignment. And with that there will be a reduction in his salary to the top level of the district court which corresponded to sixty-one thousand dollars annually.

So now plaintiff is in the position that he has two options. He can work and correct the performance deficiencies just like the other employees who had experienced this type of action by Peter George, or he could quit and take a severance which is the language under the collective bargaining agreement.

Plaintiff chose to quit, take the twenty-nine thousand dollar severance, began surreptitiously tape recording judges and fellow co-employees in the hope they would say something nice about him, and filed the instant lawsuit.

Plaintiff advances four claims in that lawsuit, and this motion seeks to dismiss all of them, and I'm going to touch on each one of them in turn. The first two will be dealt together, your Honor.

It is alleged that Peter George's action was retaliation for plaintiff's exercise of his First Amendment rights. And it's kind of warped off into a different area now that an association claim is being alleged, and I'll talk about that a little bit later though that wasn't alleged in the complaint at. all.

In addition, there's a claim that it's a [7] violation of. Michigan public policy that there was discharge in violation of Michigan public policy but that, indeed, tied to the First Amendment claim. So the two claims are analytically the same.

The problem with both of the two claims is, first of all, factually there's no support for the position. And, secondly, even if you accept the contention that's being alleged, legally they can't proceed forward.

On the factual basis, it's plaintiff's obligation to come forward with admissible evidence establishing that a motivating or substantial factor in the decision to reassign plaintiff was the exercise of his First Amendment rights. Plaintiff can't show that. It's undisputed. Peter George was the only person

that could reassign plaintiff. By plaintiff's testimony, he concedes that.

Peter George has testified and filed an affidavit that the campaign, whether it's plaintiff's brother or plaintiff himself, played no role in his decision. His decision was predicated upon his review of those three cases.

In fact, Peter George's brother actually was supporting Mary Kelly's opponent. So this suggests how little this actually meant to Peter George in the grand scheme of things.

Plaintiff has come forward with no evidence to [8] suggest that Peter George's action was based in any way, whether substantial or motivating, upon the First Amendment rights, exercise of those rights, by either plaintiff or plaintiff's brother.

Now, there are some statements that are brought forth by plaintiff's counsel in the Response Brief. Most notably there's a citation to the deposition testimony of Joseph Duanez. Mr. Duanez indicates that he overheard Mary Kelly make a statement or words to the effect, and your Honor, I'm going to quote as directly as possible, "that fucking Simasko will pay." This is alleged to have happened after Mary Kelly lost in the general election, found the results out that evening, apparently the statement is such that it happened at a campaign event or kind of a gathering following the election results.

Under the Summary Judgment paradigm the Court is required to give all reasonable inferences in favor of the nonmoving party, in this case, the plaintiff. But the Court is not required to accept the fantastic or the farfetched and I would suggest to the Court that that's exactly what this is.

I cited in my Reply Brief the *Sheinkopf* decision from the First Circuit, as well as there's a unpublished Sixth Circuit decision which has the exact same language in it.

[9] For the Court to accept this contention, the Court would have to understand that Mr. Duanez is a convicted sex of-

fender, who was sentenced by Mary Kelly's husband, Judge Daniel Kelly, of the St. Clair County Circuit Court. Mr. Duanez was a campaign worker for the plaintiff. So you have those three elements and you're being asked to believe that Mary Kelly came in, in the presence of this individual, with those facts, and made this statement to that individual, or at least in a manner that individual could overhear.

Now, Mary Kelly's been adamant that the statement was never made, and testified under oath that she never made any statement of that nature.

Now, let's assume that you feel constrained that you do have to construe in plaintiff's favor. That still is not enough to defeat the Motion for Summary Judgment, and that's in particular I direct the Court's attention to the Sixth Circuit decision in *Bailey, versus Floyd County Board of Education.*

In *Bailey*, it's a somewhat analogous situation. You have the Head Start director who alleges that she received a comment from the assistant superintendent of the school district, words to the effect, if you just keep your mouth shut, you might be able to keep your job.

She alleges that should be a basis for defeating [10] the Motion for Summary Judgment, and what the Sixth Circuit says, that a statement by a third party non-decision maker is not enough to create the factual issue that's presented. And that's precisely what happened in this case.

Even if you assume that Mary Kelly made that statement, she's the equivalent to the assistant superintendent, the chief assistant prosecutor, and there is no connection between that statement and the action by Peter George.

Now, let's assume that the Court believes that there are some factual issue and you're constrained form ruling on a legal side. There is no way that the plaintiff can succeed in their claim. The absence of the claim is that plaintiff's action

in this election so offended Peter George and Mary Kelly that they decided to reassign him as a result of it.

Under the—one of the cases that has developed for public employment and First Amendment claims, you start out with the Pickering balance. The Supreme Court has identified there are certain positions in which there is kind of a shortened analysis and that's what we've referred to as the Elroy/Branti exception in our brief.

What the Supreme Court said that in these positions where there is a confidential or a policy-making employee involved, that the Pickering balance as a matter [11] of law, favors the employer, and the cases of those in the context of political affiliation and patronage. So it wasn't actually the claim that's before the Court now of free speech, but it was that if you had an individual, for example, let's us the specific example we're talking about here. Plaintiff in the instant case, if he belonged to a different political party than Peter George, there's clear case law that the assistant prosecuting attorney is considered in Michigan to be a policy-making position. And the decision of *Monks versus Marlinga* from the Sixth Circuit in 1991. And, indeed, plaintiffs aren't contesting that fact.

In that circumstance, Peter George, could fire, terminate, could remove plaintiff from the position because he doesn't belong to the same political party, and that's what that line of cases suggest.

What we have in the instant case, though, is by alleging by free speech is the trigger as opposed to any political affiliation, we have to turn to the decision of *Rose versus Stephens* from the Sixth Circuit in 2002. In that case, the Court ruled that the *Eldrod/Branti* exception for public employees does extend the free speech, and what the Court said is that an employee in a confidential or policy-making position, may be terminated for speech on political or policy views.

[12] Now the question is does the plaintiff's failure to support the chief assistant fall within that category? I want to be clear to the Court that this isn't an inconstant position, we're telling the Court that there was no involvement, no factoring of this election whatsoever. But the only way the plaintiffs can prevail is for them to establish that the election was the motivating factor and the substantial factor. And if, indeed, that is the case, then they run head long right into this *Elroy/Branti* exception.

The involvement in an election is clearly political speech, and I can't think of a better example of political speech. And it also involves the policy within the office because you have plaintiff making comment or refusing to make comment regarding the chief assistant prosecuting attorney. So they're in a Catch-22.

Now, plaintiff puts forth several arguments, and I'll touch on them very briefly. The plaintiff claims that the *Rose* decision doesn't apply because it doesn't involve an overt act of disloyalty. Well, that isn't what the Rose decision suggests. The Rose decision says the question is whether or not there is speech on a political or policy view, and that—the caveat that they actually explain in the footnote 3 to the Rose decision was that speech that's completely unrelated to the working relationship is the [13] area that they're talking about being carved out. Well, this speech isn't because this speech if you accept their position focuses on the dynamic between the senior assistant prosecuting attorney and the chief assistant.

Plaintiff also claims that this is a movement away from the Rose decision, in other words, asking the Court to expand this from an area where there's an issue of speech to a refusal to speak. And I really think that's more of an game of semantics. What you have is the plaintiff has alleged that the public expression or the free speech was the trigger, that he engaged in some type of activity. So they've made that allegation. And certainly, if you kind of take a step back and think about

where the Elroy/Branti exception came from, the whole notion was that if an individual is not a member of your political party, then you can get rid of that individual. So there's already an element of affirmative action required upon an individual to maintain that employment. And to suggest that now requires some affirmative action that you have a dichotomy when you get to the application of free speech, it doesn't make any sense.

As a result, we don't believe they can prevail on the claim with respect to the First Amendment Retaliation.

In the event that the Court is not inclined at a minimum, we've asserted the qualified immunity defense on [14] behalf of the individual defendants.

I'd be happy to answer any questions, but just to kind of clarify for the Court, this action took place in 2002, the same year that *Rose versus Stephens* was issued by the Sixth Circuit. At that point in time, there were no subsequent decisions. In fact, I couldn't find any subsequent decisions from the Sixth Circuit explaining what the Court needs as far as the perimeters of political speech or policy views.

At a minimum, I don't think this Court can conclude that there was a clearly established right that these reasonable officials violated when they took this action, that they understood they were violating.

Now, I kind of alluded in the beginning of the argument, that plaintiffs have kind of shifted gears with respect to one aspect of their claim, and that is, in particular, the claim with respect to speech of the plaintiff's brother. Now, in our motion and in our brief, we've identified the various cases that said, you know, simply coming forward with a suggestion on family members' speech was a basis for, a termination, did not move you outside the *Elroy/Branti* exception. And, indeed, there are the cases that were cited—several cases that were cites.

What plaintiff claims in the response brief is [15] that they aren't talking about free expression issues with respect to the brother. Instead, it's an issue of association.

Well, first of all, your Honor, I apologize for not addressing this in the first brief, but it wasn't alleged in the complaint. Going back to the complaint, the Section 1983 complaint, the only allegation, specifically paragraph 26, talks about the fact that this was an abridgement to his right of freedom of speech and violation of the First and Fourteenth Amendments. There is no allegation of any associational rights that are being asserted in the complaint. It looks to be just a post hoc effort to avoid summary judgment, quite frankly.

Let's take—let's assume that the Court is inclined to consider the claim. There is still factually no support for it. There is no evidence to establish that the decision-maker took any action based upon the brother's speech. And the decision-maker is Peter George.

Additionally, I as pointed out in my reply brief, no court has recognized an association claim based upon siblings, rather the very case that's cited by the plaintiff, is focusing on a marital relationship, and it was unclear whether or not it's the marital or the First Amendment Association right, or the fundamental right to marriage that was actually involved in this claim. So if [16] we're looking at an expansion of it, the claims, recognizing that this type of claim would be precisely that type of expansion.

Your Honor, I'll address—unless you have any questions—go on to the defamation claim --

THE COURT: You may do so.

MR. FEALKO: I'm going to be very brief, your Honor.

We have alleged that plaintiff's claim is barred by the doctrine of governmental immunity in the state of Michigan. A case, as I view it, is almost directly on point, *American*

Transmissions versus Attorney General. In that case, the Michigan Supreme Court in 1997, was presented with a set of facts, where a newspaper had done a series of articles questioning the Attorney General's investigation of transmission companies. In particular, they raised the issue that it appeared that General Motors was actively involved in the investigation, and also stood the benefit from the investigation.

So you have the clear implication of those articles is that there's some political doings, if you will, going on in the Attorney General's Office with respect to the investigation. The Attorney General responds to these charges and it says not only was GM not involved, but that his investigation showed that these, in [17] particular, transmission shops, and American Transmissions, in particular, to be "crooks and cheats." This is a direct quote from the case.

American Transmissions sued and the Michigan Supreme Court said that the Attorney General was entitled to immunity on that type of statement because he was responding to questions regarding the propriety of the Attorney General's Office comments.

Peter George's letter to the Editor which is the basis for the defamation claim is similarly entitled to immunity.

The newspaper was challenging the propriety of the operation of the office, similar type of allegation, saying that maybe politics was running the office as opposed to appropriate consideration.

Peter George responded to the charges, and explained in his deposition, he felt that he had to because the legitimacy of the office was being questioned. In responding to those questions, it was part of his position because, indeed, the very essence of the position is that you have to have some legitimacy within the community.

Now, step aside—and the argument that's advanced in the Response by the plaintiff is that, well, you know, he had an improper motive, or an improper purpose. There's no suggestion of any factual basis for [18] this. It's just an assertion.

But even if you accept that under the cases that were cited in our brief, is that you are still entitled to immunity because your actual motivation or purpose is not something that is considered in determining whether or not you're entitled to immunity.

We've made several other arguments with regard to defamation. I'm not going to go into them other than to just touch on the fact that the statements that were identified are not actionable as they're not objectively, verifiable statements. This is something that's fleshed out in the brief a little bit better.

The thing that concerns me is that we're talking about subjective assertions. And much of the complaint that plaintiff takes with respect to the statement. In the case that I cited, the decision of *Ireland versus Edwards*, where it talks about if you have subjective assertion of someone not being a fit mother, that's not something that can objectively be proven. It's an subjective assertion that is not the subject of an actionable defamation claim.

And I would suggest that a similar type of claim would be someone who's not a good attorney. If you make that type of assertion, that is something that cannot be proven one way or the other. It's one thing to say, you know, he's not qualified to be an attorney because that is [19] an objectionably verifiable fact. But to suggest that someone has performance issues, is an opinion an individual could have, and indeed, the prosecutor was entitled to that opinion.

In 1974—I can't help but mention such a great quote, in *Gertz versus Welch*, the Supreme Court said, you know, your remedy isn't through the court of law; your remedy is through

the court of public of opinion. And if I you disagree with a subjective assertion you should go there. And, indeed, that's where plaintiff ought to be, rather than here on the defamation claim.

Finally, your Honor, the tortuous interference claim, the assertion is that Mary Kelly was involved in tortuously interfering with plaintiff's advantageous business relationship. Again, the undisputed facts are that Peter George made the decision. There is no evidence to suggest that Mary Kelly interfered with that relationship whatsoever even if you accept the other statement, there is no connection between the statement and any action. Indeed, the only action in this record is to show Mary Kelly's involvement to suggest that Peter George not to fire plaintiff, to reconsider that option, and look at other alternatives.

Your Honor, we respectfully request that you grant our Motion for Summary Judgment. [20]

Thank you.

THE COURT: Thank you, very much.

Counsel?

MS. BOGAS: Good afternoon.

THE COURT: Good afternoon.

MS. BOGAS: I always thought I talked fast, but I think today I've been out done.

THE COURT: Okay.

MS. BOGAS: I have that criticism of me often.

THE COURT: Before you start, as to Count II, you haven't responded to Discharge in Violation of Public Policy?

MS. BOGAS: I don't think that.—

THE COURT: I agree with you.

MS. BOGAS: I'm glad we have the same mind set.

Will we have the same mind set the rest of the way?

THE COURT: As to that, I'm going to grant the Motion.

MS. BOGAS: Okay.

THE COURT: And as to the—there's one other that—that's it.

Go on.

MS. BOGAS: Okay.

Your Honor, the facts I've heard presented by defense counsel are far, far different from what our [21] position is.

THE COURT: I understand that, and that's why there's a fact question as to some of those issues. You're not on the same page as to the facts.

MS. BOGAS: Right, I mean, talk about small town politics, I mean, Steven Simasko, was a victim in our opinion of what was going on.

Now, this is not a case, Judge—

THE COURT: I'm not making that decision, but there's no question that there's a substantial dispute as to the facts, but go on.

MS. BOGAS: I think it's clear this case is not a case that involves whether or not Steven Simasko was loyal to Peter George, the Prosecutor, because he was loyal to Peter George, the Prosecutor.

This involves his refusal to support the Chief Assistant who is riot the Prosecutor and who, in fact, Peter George, distances himself from in the election process by saying in a personnel policy, 6.14, which we've provided to the Court that all employees may express their opinions on political subjects and may take an active part in political campaigns.

So—and then he goes on to say in the newspaper article, that I'm in total agreement with those who believe that an assistant prosecutor's political activities are those of his family or his or her family, [22] should not be a factor in any employment review. And his affidavit that he supplied this Court, he said simply he didn't care one way or the other as to the result.

So this is not a case about loyalty to Peter George. This is a case about Steven Simasko refusing to speak on behalf of Mary Kelly and being approached by Mary Kelly on at least two occasions, being approached by someone who is very active in her campaign, Joseph McCarthy, on occasion, and having his brother's livelihood threatened by Mary Kelly's statements about her husband, and about Joe McCarthy's comments about Judge Kelly and Steven Simasko's brother. And then on the election night, no matter what kind of human being Mr. Duanez is, and we can talk all day about what his criminal convictions really were, Mr. Duanez has testified under oath that Mary Kelly made a specific statement on the election eve when she found out she lost, saying, "that fucking Simasko is done." Now, which Simasko she's talking about, we don't know, but we know there's Steven and there's Frank.

Frank Simasko was, in fact, an active participant in Cynthia Platzer's, now Judge Platzer, campaign, that he did radio ads for her and he also did print media for her. And that is what triggered all of this with Mary Kelly. She wanted and she told Steve Simasko, that she wanted a counter to the Simasko name, Frank Simasko name, so that it [23] wouldn't be recognized as Steve Simasko's name. And as Steve Simasko said repeatedly, I don't have a dog in this race, I'm tried, I don't want to deal with it. I don't want to be involved. And he refused to back his brother off because why should he? But he was threatened by Mary Kelly, threatened by Bill McCarthy, yet stood his ground.

And while Peter George said, it didn't matter to him, well, in fact, the timing of this situation is so dramatic that Steve Simasko has been an assistant prosecutor for years and years and years under a number of prosecuting attorneys, including now Judge Leland, and many other judges in the circuit court, and district court, in St. Clair County. Not a problem with this man's performance. No documentation whatsoever of any difficulty. And lo and behold, short a month of the election, he gets called in for a performance review, and is lambasted for the first time, criticized for the first time, in writing, other than, you know, an occasional here or there, but nothing documented in his personnel file, regarding any issues, and he's now demoted by twenty thousand dollars a year to a position that allowed him, once he was demoted under the contract, to take it as a constructive discharge or to leave.

The man couldn't hold his head up any longer in St. Clair County. In fact, does not practice law in St. [24] Clair County at this point in time because of what has happened here.

The defendants make a big deal about the tape recordings my client made, but the fact of the matter is, and I don't know of the Court is going to be considering that—

THE COURT: I'm not.

MS. BOGAS: Okay, I won't go into it.

I do look at the *Rose*, case, Judge. And the *Rose* case is an extension of some further law. However, when—and you just can't look at the *Rose* case and say, okay, the holding is this one sentence, because that's not what the case is about. It specifically refers to an overt act of disloyalty. There is no overt act of disloyalty that anybody can point to here. A refusal to support—an overt act of disloyalty to Peter George. The act of disloyalty, if there is one, is to Mary Kelly saying I'm not going to do anything. And he has a right to do that. And, in effect, is then punished because of his refusal to speak. And

also his refusal to speak to his brother, which is, to have him back off.

So the Rose case, the language clearly says overt act, there's no overt act here, and there's no disloyalty to Peter George. But Peter George, however, acted on—it is our contention—Steve Simasko's .refusal to speak in [25] support of Mary Kelly.

On the qualified immunity issue, we've briefed that for the Court. We have cited the *Procunier*, I think that's how you say it—

THE COURT: I don't know how to pronounce it.

MS. BOGAS: The U.S. Supreme Court, setting forth the factors. I think clearly that a constitutional violation here did occur, and it was certainly a freedom of speech or freedom not to speak. It's clearly a constitutional right that has been established for many, many years.

As to the governmental immunity—on the defamation claim, we believe that the case law is clear that there's qualified privilege for Peter George. And here, we do not believe he was acting within the scope of his authority, and certainly not his executive authority, because what has to be kept in mind, your Honor, is that the newspaper did, in fact, write one article. They wrote an article on December 7th, and they gave Peter George—

THE COURT: How do you get around *American Transmissions* case?

MS. BOGAS: See, that's—the way you get around that, is that. Attorney General Kelley made a specific statement to the press one time, okay?

THE COURT: And it's a pretty strong statement, [26] crooks—

MS. BOGAS: I agree. However, he was commenting on an investigation at that time.

Here, what Peter George does—now the first article, where he's quoted, December 7th, he gave a quote to the newspaper regarding Mr. Simasko's termination. But then lo and behold, on December 22nd—December 7th, the first article, he's quoted; December 22nd, he feels some need to go write his own letter with the help of Mary Kelly's husband, Judge Kelly, which just defames Steve Simasko. So it's not a one-time thing where you're commenting on an ongoing investigation. What you have here is someone who is trying to insulate himself from culpability. This is not something that, in fact, should have been in the newspapers. People should have been quiet about it just like Steve Simasko was. You don't find one quote in any newspaper from this man because he's taken the high road. But instead, Peter George decided he gave his first quote, but then with the help of Judge Kelly, Mary Kelly's husband, he gave an expanded one. That's where you get around the *American Transmissions* case because Attorney General Kelley certainly never did that. It was a one comment in response to what was being done.

We've set forth in our brief as to what we believe is defamatory about what Peter George and Judge [27] Kelly wrote although we didn't know Judge Kelly had written it at the time. We didn't find that out until Peter George's deposition, but we've set that forth in our brief.

Are there any questions I can answer for you?

THE COURT: I have none.

Thank you.

MS. BOGAS: Thank you, Judge.

THE COURT: In this matter, the Court has—each side has extensively briefed it, and the Court has had an opportunity to read that and to listen to the argument. I'm going to take it count-by-count.

As to Count I which alleges a violation of 42 USC 1983, the Court is going to deny the Motion for Summary Judgment. The Court is required to look at the facts most favorable to the plaintiff, and the Court believes-that these facts raise genuine factual issues surrounding the violation of the alleged constitutional—a violation of the constitutional-rights sufficient to survive any summary judgment.

Just listening to the arguments, and reading both of your submissions, it's obvious there's a substantial fact question involved as to that issue. The *Rose*, extension of the *Elroy* decision in terms of patriotism, dismissal exceptions, the Court does not believe applies in this particular case, to this particular plaintiff.

[28] Plaintiff did not engage—you know, the allegation isn't one on his behalf, that there's any overt speech or political activity. Instead, the allegation is one of a refusal to act or support a political—a particular political candidate and/or his refusal to curtail his brother's actions and participation in a campaign, and to publicly support any candidate. This does not fall in the Court's estimation under the Sixth Circuit's ruling in the *Rose* holding because these actions, if true, and I'm not suggesting that they are, but there is substantial fact questions, but if true, does not come within the *Rose* extension.

Summary judgment as to the constitutional rights, again, the Court believes there was a factual question that must be decided by a jury.

Defendants' qualified immunity request also must be denied as well. Again, the plaintiff's facts include that Defendant Kelly told him that the office would become unpleasant. It's an allegation, and she, of course, denies it, and that she and her husband took it personally and were displeased with plaintiff's brother's support of Kelly's opponent.

Further, there's an allegation that shortly after the election, plaintiff was demoted. That's true. I don't think anybody de-

nies that. His salary was cut. But at the [29] same time, a supporter of Ms. Kelly's replaced the plaintiff in this particular matter at a fairly high salary, and the same kind of position, and the same level of position. This was reported by several newspapers and so forth. So those are all questions that the Court believes that must be decided by a jury in this matter.

As to Count II, discharge in violation of public policy, I think counsel have agreed, and the Court will dismissed Count II.

As to defamation, the Court will grant summary judgment as to plaintiff's defamation claim for two reasons: Defendant George is entitled to immunity because he was acting the Court believes within the scope of his executive authority when he published the opinion pieces in the newspapers. And under the *American Transmissions* case I think it is clear. In addition, plaintiff the Court believes cannot establish a prima facie case of defamation. The plaintiff must prove malice as a matter of law by clear and convincing evidence. Even considering all of the evidence in the light most favorable to the plaintiff, he has not met this every heavy burden on this record. Mere ill will or dissatisfaction is not enough evidence to meet this very strict standard.

As to Count IV, intentional interference with a business relationship, that count alleges that defendant [30] Mary Kelly interfered with plaintiff's business relation by convincing Mr. George to reassign him. The plaintiff in this matter has not set forth any allegations in his complaint that would state a claim against the defendant County or against George individually. The plaintiff does not contest this motion as to these defendants, I don't believe. So accordingly, as to the County and George only, that count will be dismissed.

Summary Judgment, however, is denied as to the intentional interference with a business relationship by Defendant

Kelly because the Court is required again to look at the facts in the light most favorable to plaintiff, and that there is allegations that would establish, if proved, a prima facie intentional interference according to the elements as set forth in *Mino versus Clio School District*.

For those reasons, the Court will deny the motion at to that. For those reasons—I think I've covered everything. Is there anything I have not covered that I should?

MR. FEALKO: I don't believe so, your Honor. Will you be issuing an order?

THE COURT: We'll issues an order.

MR. FEALKO: Very good.

MS. BOGAS: Thank you.

MR. FEALKO: Thank you.

(Proceedings concluded.)

CERTIFICATE

I, JOAN L. MORGAN, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and number cause of the date hereinbefore set forth, and I do hereby certify that the foregoing transcript has been prepared by me or under my direction.

/s/ JOAN L. MORGAN
Joan L. Morgan, CSR
Official Court Reporter
Detroit, Michigan 48226

Date: December 9, 2004

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Oct. 20, 2005]

No. 04-2292

STEVEN L. SIMASKO,
Plaintiff-Appellee,

v.

COUNTY OF ST. CLAIR, a municipal corporation,
Defendant,

PETER R. GEORGE, individually and in his official capacity as St. Clair County Prosecutor, *et al.*,
Defendants-Appellants.

ORDER

BEFORE: BOGGS, *Chief Judge*; RYAN and ROGERS, *Circuit Judges*.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk